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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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NOEL CHRISTOPHER HUGGINS, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Hill County

* * * * *

STATE'S BRIEF ON THE MERITS

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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

NOEL CHRISTOPHER HUGGINS, Appellant

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Defendants should be able to invoke and waive their right to counsel at will—provided their choices are informed and are not used to manipulate the system. Appellant knew what he was doing when he pleaded guilty *pro se*, and his belated decision to withdraw his second waiver of counsel was reasonably considered to be manipulative.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

STATEMENT OF FACTS

Appellant was charged with possession of a controlled substance, methamphetamine, alleged to have occurred January 20, 2017.[1] On April 5, 2017, Appellant was arraigned following re-arrest on an increased bond.[2] The increase resulted from enhancement allegations, which appellant questioned.[3] When asked about a lawyer, appellant cut the trial court off and said, "I'm going to go *pro se*."[4] Appellant was given a waiver-of-counsel form to review and sign.[5] The trial court went over what it called "the high points": the right to an attorney at no cost, "the absolute right to represent yourself," and the right to withdraw a waiver of counsel.[6] The form twice recites that appellant had been advised of "the dangers and disadvantages of self-representation,"[7] but no such admonishments appear in the record. Appellant signed it and, following the failure to work out a deal with the State, requested discovery.[8] He received the offense and DPS lab reports, and was

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1 1 CR 4.

2 Supp RR 2 at 4.

3 Supp RR 2 at 4-5

4 Supp RR 2 at 5.

5 Supp CR 5-6.

6 Supp RR 2 at 6-8.

7 Supp CR 5-6.

8 Supp RR 2 at 8-9.

permitted to watch the traffic stop video in court that day.[9]

The decisiveness with which appellant announced his intent to proceed *pro se* was explained at a hearing the following month. After the trial court advised appellant against representing himself, appellant agreed; he said he was doing it because he had no money and "ha[d] had numerous shady dealings with the public defender's office and this county."[10] That hearing ended shortly after the trial court explained it would appoint one of "the same attorneys that people hire" upon request.[11]

Appellant requested an attorney at the next hearing, which was to be the final pretrial hearing.[12] Appellant said he "recently got clean," and was "going to go through the proper stages and try to handle this appropriately and more efficiently than I have been, sir."[13] Lyle Gripp was appointed the next day, June 22, 2017.[14]

Roughly a month later, appellant sent a letter to the trial court saying he had fired Mr. Gripp and wished to proceed *pro se*.[15] Appellant's problem with counsel

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[9] Supp RR 2 at 11-12.

[10] Supp RR 3 at 5-6.

[11] Supp RR 3 at 6.

[12] Supp RR 4 at 5.

[13] Supp RR 4 at 5.

[14] 2nd Supp Cr 3.

[15] 2nd Supp CR 11-13.

must have been (temporarily) worked out; Mr. Gripp's motion to withdraw was not filed until April 16, 2018.[16] The order was granted and Gregg Hill was substituted that day.[17]

Another "final pre-trial conference" had been set for May 8, 2018, which would have been a few weeks after the substitution. It was reset seven times, pushing it to January of 2019.[18] By December of 2018, however, appellant had filed a *pro se* motion collaterally attacking one of the enhancement offenses.[19] The January 16, 2019 hearing opened with Mr. Hill bringing to the trial court's attention that appellant was (again) considering going *pro se*.[20] Their disagreement was about the enhancement allegations, which were his Utah sex-offender conviction and the resulting Texas failure-to-register (FTR) conviction.[21] When pressed about self-representation, appellant said he did not want Mr. Hill fired.[22] As it had months prior, the trial judge expressed what a bad idea self-representation is.[23] As the discussion

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16 2nd Supp CR 16-19.

17 2nd Supp CR 20.

18 2nd Supp CR 21-27.

19 2nd Supp CR 28-29.

20 2 RR 4.

21 2 RR 4-9; 1 CR 4.

22 2 RR 8.

23 2 RR 8 ("I'm not going to represent myself when I get in trouble.").

of appellant's *pro se* enhancement motion continued, appellant tried to participate and was told he was not entitled to hybrid representation.[24] The trial court later entertained argument from appellant before reiterating that he would only listen to counsel.[25] At that point, appellant said he would fire counsel so he could make his argument.[26] The trial court chose to ignore appellant, and Mr. Hill finished the hearing on appellant's motion.[27]

Mr. Hill was still representing appellant at the February 7, 2019 hearing.[28] It began with Mr. Hill informing the court that appellant again wanted to represent himself.[29] Appellant affirmed that and signed another copy of the waiver of counsel he had signed nearly two years earlier.[30] The record reflects no oral admonishments, but appellant acknowledged he had read it before.[31] The trial court set trial for March 11, 2019, and assured appellant there would be plenty of time to consider any motions

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[24] 2 RR 11-12.

[25] 2 RR 13-14.

[26] 2 RR 14.

[27] 2 RR 14 *et seq*.

[28] 3 RR 4.

[29] 3 RR 4.

[30] Supp CR 3-4.

[31] 3 RR 6.

appellant filed.[32]

Appellant filed three motions *pro se*: a motion for discharge due to delay under Art. 28.061, something about cruel treatment in jail (Art. 16.21), and a motion for expert fingerprint analysis.[33] A hearing on pre-trial motions was held March 1, 2019, but the only matter discussed was the State's motion to amend the indictment.[34] On March 4, appellant filed a witness list *pro se*.[35] On March 8, he filed a motion for an appointed investigator, a motion to sequester the jury, two motions related to discovery, and a motion to direct an investigator to subpoena his witnesses.[36]

Voir dire began as scheduled on March 11, 2019. The trial court qualified the panel and, outside the presence of the venire, asked appellant if he wanted to have street clothes for his trial.[37] His response: "Waive my right to the jury and plead guilty."[38] Appellant offered no explanation. Even after he complained about not receiving a copy of the amended indictment, he said, unsolicited, "I still wish to plead

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[32] 3 RR 6-7.

[33] 1 CR 20-25.

[34] 4 RR *et seq*.

[35] 1 CR 30.

[36] 1 CR 39-44.

[37] 5 RR 28.

[38] 5 RR 28.

guilty in open court."[39] After he was told he had the right to appeal and have an attorney for that appeal, appellant asked for an attorney for the plea proceeding.[40] The trial court denied it:

> DEFENDANT: Yes. What about having an attorney right now?
>
> THE COURT: You've already made a choice not to have an attorney.
>
> DEFENDANT: This is like way above my pay grade.
>
> THE COURT: I tried to tell that you twice. You didn't listen to me.
>
> DEFENDANT: So I can't have an attorney now?
>
> THE COURT: No, sir, not at this stage. But you can certainly appeal, based on the fact that you didn't have one, if you want to.[41]

Appellant read his plea paperwork carefully and asked a number of questions about it.[42] Appellant was admonished as to his plea.[43] Punishment was set for the following day because that was when the State—expecting a trial—told its witnesses to appear.[44]

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[39] 5 RR 30.

[40] 5 RR 31.

[41] 5 RR 31-32.

[42] 5 RR 32-39.

[43] 5 RR 40-42.

[44] 5 RR 42.

The punishment hearing began with appellant's refusal to submit to routine fingerprinting.[45] Appellant attributed his ignorance to his need for an attorney.[46] The trial court reminded him of the situation:

> THE COURT: Mr. Huggins, I gave you two attorneys. You got rid of both of them. You waited until I had 61 people – actually, I started with 71 people in this courtroom and decided you didn't – suddenly then you wanted to plead guilty because you wanted to jack the system around.
>
> DEFENDANT: I don't want to jack the system around.
>
> THE COURT: I went ahead and went along with it. State waived its right to a jury trial. You waived your right to a jury trial. Guilt/innocence is over with; we're now going into punishment.[47]

Appellant again said he needed an attorney.[48] It was a claim appellant made thrice more during the hearing.[49] On two occasions, it was because he was prevented from using a witness or the proceeding to challenge the FTR conviction to which he

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[45] 6 RR 6.

[46] 6 RR 6.

[47] 6 RR 6-7.

[48] 6 RR 7.

[49] 6 RR 57 ("See, this is why I need an attorney, Your Honor, sir. I have no idea what I'm doing."), ("I'm going to try to get this over with for my appeal. We'll just let the State keep objecting, I guess. Again – again, I have to extremely object that I do not have an attorney."), 86 ("See, I'm telling you, Your Honor, I need an attorney because –"), 89 ("All I can say at this point, Your Honor, is I want an attorney.").

pleaded "not true."[50] The trial court explained, as it had pretrial, that it understood appellant's argument and would make the legal determination itself.[51] After two of these requests for counsel, the trial court again reminded appellant how they arrived at this situation:

> THE COURT: Mr. Huggins, I gave you two lawyers.
>
> DEFENDANT: I understand that.
>
> THE COURT: You fired them both. You didn't want them. They didn't run your case the way you wanted it run.
>
> DEFENDANT: Now, I'm raising my hand in court and saying this is above my pay grade and my rights right now are not being protected.
>
> THE COURT: Well, and --
>
> DEFENDANT: And I'm asking for a lawyer because it -- it -- it clearly -- this is clearly a setup of some kind.[52]
>
> . . . .
>
> THE COURT: Okay. Well, I'm going to get you an attorney when we get finished. But I gave you two, and I did everything I could. I told you over the years, all the way back to sometime in 2017, that you need to be represented by a lawyer, and you didn't like who I provided. I gave you lawyers that had over 60 years of trial experience, probably closer to 70, and you

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[50] 6 RR 56, 89.

[51] 2 RR 6, 13-15; 6 RR 57, 87-89.

[52] 6 RR 86-87.

didn't like it so . . .[53]

The trial court also intimated his belief that appellant's insistence on his view of the FTR enhancement was the reason he was proceeding *pro se*.[54]

The trial court found both enhancements true and sentenced appellant to 18 years.[55]

SUMMARY OF THE ARGUMENT

Over the course of two years—most of it represented by counsel—appellant demonstrated that he had sufficient awareness of the dangers and disadvantages of self-representation to make the multiple admonishments he received sufficient to validate his waiver of counsel for the proceeding held. By the time he changed his mind about self-representation (again), his (re)invocation of the right to counsel was fairly seen as a bad-faith manipulation of the system. That decision would be upheld under the Sixth Amendment. It should be upheld under TEX. CODE CRIM. PROC. art. 1.051(h).

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[53] 6 RR 89.

[54] 6 RR 89.

[55] 6 RR 104-05.

ARGUMENT

I. The right to self-representation is fundamental.

The Sixth Amendment says "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[56] We normally focus on the "counsel" aspect of the amendment but it is perhaps more about the "correlative" but independent right to defend oneself.[57] "The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation."[58] "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[59] "[T]here is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel."[60] As this Court said in *Johnson v. State*, "the right to selfrepresentation(sic) does not arise from the accused's power to waive the assistance of counsel but independently from the Sixth Amendment grant to the *accused personally* the right to defend."[61] Even *Faretta v. California*, the style case for valid waivers of counsel at trial, is primarily about the right to self-representation.

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[56] U.S. CONST. Art. VI.

[57] *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942).

[58] *Faretta v. California*, 422 U.S. 806, 832 (1975).

[59] *Id.* at 819-20.

[60] *Id.* at 832.

[61] 760 S.W.2d 277, 278 (Tex. Crim. App. 1988) (emphasis in original).

The "dangers and disadvantages" admonishment first appears on the last page of the opinion, and only on the way to concluding Faretta was "deprived . . . of his constitutional right to conduct his own defense."[62]

The Supreme Court was and is protective of that right. "[T]he Constitution does not force a lawyer upon a defendant."[63] Instead, "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."[64] "To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment."[65] This freedom to act without counsel can be seen during post-indictment interviews,[66] and when pleading guilty,[67] waiving jury

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[62] *Faretta*, 422 U.S. at 835.

[63] *Adams*, 317 U.S. at 279.

[64] *Faretta*, 422 U.S. at 820.

[65] *Id*.

[66] *Patterson v. Illinois*, 487 U.S. 285, 290 (1988).

[67] *Adams*, 317 U.S. at 277 ("And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt.").

trial,[68] or, as in *Faretta*, proceeding to a jury trial.[69] Infringing upon it "can only lead [a defendant] to believe that the law contrives against him."[70] In short, our system of justice does not "imprison a man in his privileges and call it the Constitution."[71]

Courts are thus encouraged (and in many cases required) to allow a defendant to invoke his right to self-representation and waive counsel. Courts are also encouraged (and in many cases required) to allow a defendant to withdraw that waiver of counsel. A trial court's discretion in these matters is limited. As to the former, a defendant cannot be permitted to represent himself if he does not adequately understand what forgoing counsel means. As to the latter, he cannot use the right to withdraw that waiver to unduly interfere with the administration of justice. Both are implicated in this case.

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[68] *Id*. at 275 ("There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer.").

[69] *Faretta*, 422 U.S. at 810.

[70] *Id*. at 834. This was part of the rationale in *McCoy v. Louisiana*, which held that even a defendant who accepted counsel retains "[a]utonomy to decide . . . the objective of the defense" while counsel controls the "strategic choices about how best to *achieve* a client's objectives." 138 S. Ct. 1500, 1508 (2018) (emphasis in original). McCoy objected to his attorneys' concessions of guilt in opening statements, and told the trial court he believed his attorney was "selling [him] out." *Id*. at 1506-07. The Supreme Court held that McCoy's right to counsel was violated by court-appointed counsel who did not follow his client's objective. *Id*. at 5012.

[71] *Adams*, 317 U.S. at 280.

II. Appellant received admonishments suitable for his pseudo-contested punishment hearing.

A. A defendant must be told "the dangers and disadvantages" of his choice.

"Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"[72] The Supreme Court did not elaborate in *Faretta*, but it noted Faretta was told he must "follow all the 'ground rules' of trial procedure," including rules governing examination/objections and decorum.[73] This Court requires that a defendant going to trial *pro se* be aware of the general nature of the offense charged, its possible penalties, and "that there are technical rules of evidence and procedure that he will be obligated to comply with and that he will not be granted any special consideration because of his lack of formal training in law."[74] "As *Faretta* . . . held," this Court later said, "[a defendant's] eyes should be open to the fact that, while it is undoubtedly his right, he is about to embark on a risky course."[75]

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[72] *Faretta*, 422 U.S. at 835 (quoting *Adams*, 317 U.S. at 279).

[73] *Id*. at 808 n.2, 836.

[74] *Geeslin v. State*, 600 S.W.2d 309, 314 (Tex. Crim. App. 1980).

[75] *Johnson*, 760 S.W.2d at 279.

1. The standard is different for different proceedings.

Full *Faretta* warnings do not apply to all *pro se* proceedings. The Supreme Court "take[s] a more pragmatic approach to the waiver question" because the "dangers and disadvantages" at the heart of the warnings vary by proceeding.[76] "The information a defendant must possess in order to make an intelligent election . . . will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding."[77] Once the defendant knows these "basic facts"—"the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel"—his waiver of his right to counsel is "knowing."[78]

For example, *Faretta* and progeny set out "the most rigorous restrictions on the information that must be conveyed to a defendant" because of "the enormous importance and role that an attorney plays at a criminal trial[.]"[79] By comparison, the waiver of counsel during post-indictment questioning requires a less searching or

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[76] *Patterson*, 487 U.S. at 298; *see also Iowa v. Tovar*, 541 U.S. 77, 89 (2004) ("[A]t earlier stages of the criminal process, a less searching or formal colloquy may suffice.").

[77] *Tovar*, 541 U.S. at 88. *See also Patterson*, 487 U.S. at 298 (The type of warnings required depend on "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage").

[78] *Tovar*, 541 U.S. at 88.

[79] *Patterson*, 487 U.S. at 298.

formal inquiry than during trial.[80] This is not because post-indictment questioning is less important than a trial, "but because the full 'dangers and disadvantages of self-representation' during questioning are less substantial and more obvious to an accused than they are at trial."[81] In between these two proceedings, pleas of guilty at arraignment require few (if any) admonishments beyond what would be generally required to waive a trial. The trial court need not give specific warnings about the possibility of defenses counsel may discover and the independent opinion on his plea a counsel may provide; informing him of the nature of the charges, possible punishment, and entitlement to counsel will suffice.[82]

2. Applying this jurisprudence is more art than science.

Assessing the adequacy of admonishments is difficult when the proceeding—a pseudo-contested punishment hearing, for example—does not equate neatly to either a post-indictment interview, custodial interrogation, plea of guilty at arraignment, or full-blown trial on the merits. This is because the ends of the admonishment spectrum are not far apart.

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[80] *Id*. at 299.

[81] *Id*. at 299-300 (citation omitted).

[82] *Tovar*, 541 U.S. at 91-92. As the United States as *amicus curiae* in that case suggested, not only are these specific warnings not constitutionally required, they could be confusing or cause delay because they imply there is something to be found. *Id*. at 93.

On the low end, a waiver is valid "'if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.'"[83] On the high end, "the most rigorous restrictions on the information that must be conveyed to a defendant"[84] amount to a trial judge telling the defendant "that he thought it was a mistake not to accept the assistance of counsel, and that [the defendant] would be required to follow all the 'ground rules' of trial procedure."[85] There is not a lot of daylight between those two. Assuming a neat test could be formulated, the Supreme Court has declined to "prescribe[] any formula or script to be read to a defendant who states that he elects to proceed without counsel[,]" instead looking beyond the stage of the proceeding to "a range of case-specific factors, including the defendant's education or sophistication [and] the complex or easily grasped nature of the charge."[86] This Court is thus left to examine the record and decide whether the defendant's eyes were sufficiently open to the risks that proceeding without assistance of counsel posed.

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[83] *Id.* at 92 (quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis in *Ruiz*)).

[84] *Patterson*, 487 U.S. at 298.

[85] *Faretta*, 422 U.S. at 835-36.

[86] *Tovar*, 541 U.S. at 88.

3. There are problems with this Court's jurisprudence.

This Court is not writing on a blank slate on this issue, but it should reconsider some aspects of its jurisprudence. In *Johnson v. State*, this Court concluded over twenty years before *Tovar* that the admonishments required in *Faretta* do not apply when a defendant pleads guilty.[87] It held *Faretta* was not "triggered" because "[t]here [wa]s not a scintilla of evidence in this record of either the appellant desiring to represent himself or that he was denied or deprived of his right to counsel at his trial."[88] When a defendant wishes to plead guilty, it held, "the issue is not whether the trial court admonished the accused of the dangers and disadvantages of self-representation, but rather whether there was a knowing, voluntary, and intelligent waiver of counsel."[89] This distinction between valid waivers of counsel and valid warnings about self-representation was consistent with this Court's post-*Faretta* jurisprudence.[90]

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[87] 614 S.W.2d 116, 119 (Tex. Crim. App. 1981) (op. on reh'g).

[88] *Id*.

[89] *Id*. That more basic inquiry was satisfied because Johnson was informed of his right to counsel and waived it. *Id*. at 120. As the panel opinion showed, Johnson was also informed of the charges against him at the hearing but not the range of punishment, which had been explained at Johnson's numerous previous trials on the same offense. *Id*. at 118 (panel op.).

[90] *See*, *e.g.*, *Geeslin*, 600 S.W.2d at 313 ("These are two distinct requirements and the trial court must be satisfied as to their existence before allowing a defendant to proceed to represent himself."); *Goodman v. State*, 591 S.W.2d 498, 500 (Tex. Crim. App. 1979) (en banc op. on reh'g) ("[T]he record in the instant case fails to show a voluntary and knowing waiver of the right to counsel, (continued...)

Two years before *Tovar*, this Court followed *Johnson* in *Hatten v. State*, in which it held "[t]he requirements of *Faretta* are not invoked by a misdemeanor defendant who . . . does not contest his guilt."[91] It remanded for determination of whether Hatten's waiver of counsel was knowing, intentional, and voluntary—what it again called a "separate issue apart from the entitlement to admonishments under *Faretta*."[92]

These holdings are misleading on two fronts. First, they artificially separate the waiver of counsel from the decision to represent oneself. Second, as a result, they make it sound like the warnings required to represent oneself come in two forms: *Faretta* or nothing. As explained above, the Supreme Court employs a multi-factor test that considers all the circumstances and scales the warnings about self-representation to the proceeding at hand. This was made clear in *Tovar*, which was decided after this Court's would-be controlling cases.

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[90](...continued)
retained or appointed, and also fails to reflect appellant was made aware of the dangers and disadvantages of self-representation so as to establish that the appellant knew what he was doing and that his choice was made with his 'eyes open.'"); *Renfro v. State*, 586 S.W.2d 496, 500 (Tex. Crim. App. 1979) (panel op.) ("Furthermore, not only does the record in the present case fail to demonstrate a voluntary and knowing waiver of the right to counsel, it also fails to show that the appellant's decision to represent himself was intelligently made as required by *Faretta* . . . .").

[91] *Hatten v. State*, 71 S.W.3d 332, 334 (Tex. Crim. App. 2002). Hatten complained about inadequate admonishments at a revocation hearing in which he pleaded "true" to the allegations. *Id*. at 333.

[92] *Id*. at 334-35.

In short, it's not that the "dangers and disadvantages" warnings do not apply at all outside of a *Faretta* situation, it is that the "dangers and disadvantages" are different than those Faretta faced. *Johnson* and *Hatten* should be viewed accordingly.[93]

B. Admonishments should be measured by the proceeding actually held.

As an initial matter, appellant argues that the requisite scope of the admonishments should be based on the proceeding the defendant intended to pursue at the time of the waiver.[94] If a defendant intends to contest guilt at a jury trial when he announces his intent to proceed *pro se*, appellant suggests, he must be given full *Faretta* admonishments regardless of whether he ultimately pleads guilty. That cannot be the rule, for multiple reasons.

First, trial courts are not mind-readers. Appellant's approach requires a defendant who announces his ultimate plan at the time he invokes his right to self-representation. That happened in *Tovar*, but that will not always be the case.

Second, many—maybe most—defendants don't know at the time of their waiver what their ultimate plan is. In this case, appellant waived counsel and

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[93] Any language in those cases that emphasizes the misdemeanor nature of the offenses therein should be disavowed, too. Although *Tovar*, like *Johnson* and *Hatten*, dealt with a misdemeanor charge, the Supreme Court was clear from the second sentence of its opinion that, "The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres." *Tovar*, 541 U.S. at 81. None of the relevant analysis mentions offense level.

[94] App. Br. at 36-37.

immediately entered into an off-the-record plea negotiation. What should the trial court have taken from this regarding appellant's ultimate plan?

Third, defendants who think they know whether they want trial and/or counsel change their minds—a lot. Basing the requisite scope of admonishment on what a defendant thinks he wants at any one point in the case's life-cycle rather than what he actually does one or two years later makes little sense.

There are three ways to deal with this reality. The first is to require new admonishments at every proceeding a defendant attends *pro se*. The second is to require *Faretta*-caliber admonishments the first time a defendant announces his intent to proceed *pro se*, regardless of whether he expresses the intent to go to trial. Appellant says the first "seems untenable"[95]—he's right—but both have problems. Requiring repeated inquiry into the defendant's intent or warnings about a proceeding he does not want would serve only to create confusion. As stated in *Tovar*, it might also sound like the trial court is suggesting the defendant change his mind about self-representation, his intended plea, or both.[96] Finally, pretending such admonishments have value would needlessly multiply the opportunities for complaints about "insufficient" admonishments when a less complex proceeding is held.

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[95] App. Br. at 38.

[96] *Tovar*, 541 U.S. at 93.

The third way to deal with the reality of defendants who change their minds is to assess the adequacy of the cumulative admonishments in light of the decision(s) the defendant ultimately made. This is simple, and it makes sense. In the absence of evidence that invalid *Faretta* warnings resulted in some other sort of *pro se* proceeding,[97] there is no reason not to evaluate the warnings received in light of the dangers and disadvantages of self-representation in the proceeding actually held.

C. Appellant knew what he was getting into.

Appellant clearly did not receive the admonishments a waiver of counsel for trial on guilt require. But he clearly did not represent himself at a jury trial on guilt. Instead, appellant pleaded guilty and "tried" a semi-contested punishment hearing on a question of law. The warnings he got were good enough under the circumstances.

The trial court twice made appellant aware of his right to counsel. He told appellant twice it was a bad idea to represent himself. But appellant had experience with criminal proceedings—the two felony enhancements plus a prior felony theft[98]—and bad experience with lawyers; he knew at the outset he wanted to proceed *pro se*.[99] He exhibited some ability in this regard; he filed many motions with legal

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[97] It is unclear how this might happen or, more importantly, how one would prove it did. It would presumably require a post-conviction proceeding that provides for expanding the record.

[98] 7 RR 7 (State's Ex. 2).

[99] Appellant attributed his initial change of mind to cleaning himself up and starting to attend (continued...)

bases on his own behalf, both when represented and when not. He also identified his primary defense on his own. From the beginning, appellant consistently complained about the use of his FTR conviction to enhance his punishment range. He pursued his defense when represented and when not. He apparently also filed a writ to "undo" the FTR offense level.[100] It looks like his refusal to brook disagreement about it was the reason he fired at least one of his attorneys. When the time for trial came, he was sure he wanted to plead guilty. He made no complaints about self-representation to that point. It was only at the beginning of his punishment hearing that he (again) requested counsel. His invocation stemmed primarily from his difficulty in using the proceeding to collaterally attack his FTR conviction. Appellant had every reason to know this would be the case, as he presented his argument to the trial court pretrial and the trial court explained that it was a question of law the trial court would have to research for itself. Whatever else a defendant with appellant's knowledge and experience needed to hear about how helpful counsel could be generally, it can be assumed he learned it during the 595 days he was represented by counsel before his second waiver.

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[99](...continued)
college. This suggests a healthy state of mind and advanced education, even if his decision regarding counsel did not last.

[100] 5 RR 37; 6 RR 88.

As the Supreme Court made clear in *Faretta*, "[a defendant's] technical legal knowledge, as such, [i]s not relevant to an assessment of his knowing exercise of the right to defend himself."[101] Appellant's mistaken belief that cross-examination and argument at a punishment hearing were the proper way to collaterally attack a prior conviction does not change what the record shows: he had the ability to appreciate the practical disadvantages he would confront representing himself making his chosen argument at his chosen proceeding.

III. Appellant should not be permitted to "jack the system around."

A. The administration of justice should be protected.

By constitutional common law and statute, a defendant can withdraw his waiver and enjoy the assistance of counsel. As important as that right is, however, it must yield in some instances to the needs of the system as a whole.

In numerous cases, this Court has held that invocation of the right to self-representation and subsequent request for counsel in some form cannot be used "to manipulate the court or to delay his trial[,]"[102] "manipulated in such a manner so as

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[101] *Faretta*, 422 U.S. at 836.

[102] *Culverhouse v. State*, 755 S.W.2d 856, 861 (Tex. Crim. App. 1988) (assertion of right to self-representation followed by request for dismissal of standby (former) counsel and appointment of other counsel).

to throw the trial process into disarray[,]"[103] or "obstruct the orderly procedure in the courts or to interfere with the fair administration of justice."[104] In the context of substitution-of-counsel motions in federal habeas practice, the Supreme Court was firm: "Protecting against abusive delay *is* an interest of justice."[105] That court also held in a separate case that consideration of, *inter alia*, disruption or delay when reviewing denials of post-waiver requests for counsel was not "contrary to or an unreasonable application of" the Supreme Court's general standards expressed in its assistance-of-counsel cases.[106]

This view is consistent with this Court's treatment of the withdrawal of waiver of jury trial. Such a defendant "should be permitted to withdraw his previously executed jury waiver if he establishes on the record that his request to do so is made sufficiently in advance of trial such that granting his request will not: (1) interfere

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[103] *Dunn v. State*, 819 S.W.2d 510, 520 (Tex. Crim. App. 1991) (assertion of right to self-representation followed by request and reinstatement of previous attorneys, who were later made stand-by attorneys over objection, followed by request for alternative counsel).

[104] *Burgess v. State*, 816 S.W.2d 424, 428 (Tex. Crim. App. 1991) (continuance and alternative shadow counsel refused after defendant fired his second appointed counsel on the day of trial and his allegedly retained counsel fell through).

[105] *Martel v. Clair*, 565 U.S. 648, 662 (2012) (emphasis in original).

[106] *Marshall v. Rodgers*, 569 U.S. 58, 62-63 (2013) (reviewing a scheme that evaluates a trial court's decision "based on the totality of the circumstances, including the quality of the defendant's representation of himself, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow the granting of such a motion.") (cleaned up).

with the orderly administration of the business of the court, (2) result in unnecessary delay or inconvenience to witnesses, or (3) prejudice the State."[107] It is also consistent with the rationale for review of rulings on motions for continuance, something "within the sound discretion of the trial court"[108]:

> Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel.[109]

In short, a defendant is not permitted to use the Constitution to unduly interfere with the criminal justice system. The question presented in this case is whether the Texas Legislature intended defendants to use a statute to do just that.

B. Statutory construction is about discerning legislative intent from text.

Statutory interpretation is about effectuating the collective intent of the legislators who enacted it.[110] It is an "attempt to discern the fair, objective meaning

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[107] *Marquez v. State*, 921 S.W.2d 217, 223 (Tex. Crim. App. 1996).

[108] *Renteria v. State*, 206 S.W.3d 689, 699 (Tex. Crim. App. 2006).

[109] *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

[110] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

of that text at the time of its enactment."[111] Courts begin "by examining [the] text in the context in which it appears."[112] Courts focus on the text "because the text is the only *definitive* evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law."[113] If this plain language would lead to absurd results or is ambiguous, "*and only then*, out of absolute necessity, is it constitutionally permissible for a court to consider . . . extratextual factors[,]" Code Construction Act notwithstanding.[114]

C. The text shows the Legislature intended "at any time" to mean "at any time," not "under any circumstances."

Article 1.051(h) says, in full:

> A defendant may withdraw a waiver of the right to counsel at any time but is not entitled to repeat a proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel. If the defendant withdraws a waiver, the trial court, in its discretion, may provide the appointed counsel 10 days to prepare.[115]

Colloquially speaking, "at any time" is fairly understood to imply something can take

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[111] *Id*.

[112] *Timmins v. State*, 601 S.W.3d 345, 348 (Tex. Crim. App. 2020). *See also Lopez v. State*, 253 S.W.3d 680, 685 (Tex. Crim. App. 2008) ("[W]e read words and phrases in context and construe them according to the rules of grammar and usage.").

[113] *Boykin*, 818 S.W.2d at 785 (emphasis in original).

[114] *Id*. at 785-86, 786 n.4 (emphasis in original). *See* TEX. GOV'T CODE § 311.023 (courts may consider extratextual sources "whether or not the statute is considered ambiguous on its face").

[115] TEX. CODE CRIM. PROC. art. 1.051(h).

place at one's convenience, without limitation and regardless of the circumstances. The Code of Criminal Procedure is not colloquial, like a conversation between friends.[116] Its terms, like that of any statute, should be taken literally. Taken literally, "at any time" means "at any point in time," not "under any circumstances." In context, it describes when during a prosecution a defendant may withdraw his waiver of counsel. The answer: at any point. No matter how early or late in the prosecution, a defendant is allowed to reconsider his decision.

But that is not the same thing as saying he can withdraw his waiver at any time regardless of the circumstances. If that had been the Legislature's intent, it could have used the phrase "under any circumstances." For example, the same Code says "a child may not, under any circumstances, be detained in a place of nonsecure custody for more than six hours."[117] The distinct impact of that phrase is clear. That statute also illustrates the difference between time and surrounding circumstances when speaking literally—as legislatures do.

Not only is "at any time" literally a description of time, the rest of the statute shows its temporal sense is the best interpretation. The first restriction is explicit: the defendant does not get to redo a proceeding. The second is implicit: the discretion

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[116] https://www.merriam-webster.com/dictionary/colloquial full definition 1a ("used in or characteristic of familiar and informal conversation") (last checked January 3, 2022).

[117] TEX. CODE CRIM. PROC. art. 45.058(e).

to provide 10 days for counsel to prepare means there is discretion not to provide it.[118] In short, (re)gaining an attorney is prospective and might not delay the trial. These are temporal restrictions. They, like the Sixth Amendment, do not purport to speak to the trial court's discretion *vel non* to refuse the waiver under certain circumstances. Rather, they inform the defendant of the drawbacks to delaying his waiver.

Appellant's interpretation depends on characterizing these two clauses as the sole restrictions on an otherwise unfettered right to withdraw waiver of counsel under any circumstances. If these restrictions were intended as the sole means of preventing abuse of the system, they fall woefully short. The first restriction is hardly a deterrent; no reasonable person believes he can go *pro se* until the verdict is about to be read and then have the trial redone with counsel.[119] And there is no reason to think this or any appellate court would permit such manipulation of the statutory right to counsel in the absence of this provision.

The second restriction sounds harsh but it is unclear how strictly it could be enforced without creating the very problems appellant is seeking to avoid. When a lawyer appointed the day of trial is forced to proceed that day, you get paradigmatic

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[118] *Barnes v. State*, 921 S.W.2d 881, 884 (Tex. App.—Austin 1996, pet. ref'd) ("Of course, the discretion to provide the ten-day preparation period necessarily includes the discretion to refuse it."). This latter limitation is apparently a corollary to Art. 1.051(e), which says "appointed counsel is entitled to 10 days to prepare for a proceeding but may waive the preparation time with the consent of the defendant in writing or on the record in open court." *Id.*

[119] Why restrict it to before the verdict is read? "At any time," right?

denial of effective assistance of counsel. You get *Powell v. Alabama*, in which the Supreme Court declared that a trial court's duty to provide counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[120] Especially relevant to appellant's invocation of this restriction, it said, "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."[121] No cases that invoke art. 1.051(h) and uphold the denial of ten days to prepare address this tension.[122] It does not appear to have been a concern.[123] Perhaps this is because some of the 1.051(h) cases suggest

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[120] 287 U.S. 45, 71 (1932).

[121] *Id*. at 59.

[122] One case noted that ineffective assistance was not raised as a point of error. *Barnes*, 921 S.W.2d at 884 n.3.

[123] As luck would have it, defense counsel in some of these cases appear to have received enough time under the circumstances. *See Weatherly v. State*, No. 13-14-00192-CR, 2015 WL 4116672, at *3 (Tex. App.—Corpus Christi July 2, 2015, no pet.) (not designated for publication) (appointed counsel was given no extra time but had represented Weatherly for almost a year earlier in the process and had discussed the case multiple times with the State); *Webb v. State*, No. 13-03-041-CR, 2006 WL 3525427, at *9 (Tex. App.—Corpus Christi Dec. 7, 2006, pet. ref'd) (not designated for publication) (counsel requested at punishment given until the following Monday to prepare); *Jones v. State*, No. 01-03-00828-CR, 2005 WL 174484, at *2 (Tex. App.—Houston [1st Dist.] Jan. 27, 2005, no pet.) (not designated for publication) (newly-appointed counsel given nearly seven days after having been shadow counsel for five). *But see Cole v. State*, 929 S.W.2d 102, 102-03 (Tex. App.—Beaumont 1996, pet. ref'd) (shadow counsel appointed earlier on the day of waiver was given less than two days to prepare for trial).

request for a continuance is a separate option for a defendant who belatedly invokes art. 1.051(h).[124] That may provide some relief from the harsh and possibly unconstitutional consequences of this restriction. If it does, however, it also renders it a nullity.

In short, "at any time" is a temporal phrase describing a right with temporal restrictions that could not have reasonably been intended to be a definitive list of limitations on that right.

D. This interpretation is consistent with the rest of the Code and protects the system.

The Code of Criminal Procedure is replete with statutes that use the phrase "at any time." There are dozens. In some, the phrase unmistakably refers to "the point or period when something occurs."[125] These can involve a number of days, as with sex-offender registration,[126] or an hour or period of hours within a day, as with

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[124] *Barnes*, 921 S.W.2d at 883 (noting counsel asked for a continuance after appointment). *See also Weatherly*, 2015 WL 4116672, at *3 (mentioning failure to seek a continuance but only in context of jumping straight to request for mistrial).

[125] https://www.merriam-webster.com/dictionary/time (full definition 2) (last checked December 27, 2021).

[126] *See*, *e.g.*, TEX. CODE CRIM. PROC. art. 62.058(a) ("For purposes of this subsection, a person complies with a requirement that the person register within a 90-day period following a date if the person registers at any time on or after the 83rd day following that date but before the 98th day after that date.").

executions of judgment.[127] Some are based around an event, as with the time for filing a pretrial motion for continuance[128] or negotiating an asset forfeiture.[129] Sometimes, "at any time" refers to an open-ended duty, as with discovery.[130]

In other statutes, readers understand the phrase to refer to time because there are conditions placed on the exercise of the "at any time" discretion. This condition can be a requirement of good cause, as with granting a continuance,[131] or that the

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[127] *See*, *e.g.*, TEX. CODE CRIM. PROC. art. 43.14(a) ("Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice.").

[128] TEX. CODE CRIM. PROC. art. 28.01 §1(5) ("The pre-trial hearing shall be to determine any of the following matters: . . . Motions for continuance either by the State or defendant; provided that grounds for continuance not existing or not known at the time may be presented and considered at any time before the defendant announces ready for trial[.]").

[129] TEX. CODE CRIM. PROC. art. 59.03(e) ("At any time before notice [of forfeiture proceeding] is filed under Article 59.04(b), an attorney representing the state may not request, require, or in any manner induce any person, including a person who asserts an interest in or right to property seized under this chapter, to execute a document purporting to waive the person's interest in or rights to the property.").

[130] TEX. CODE CRIM. PROC. arts. 2.1397(c) ("If at any time after the case is filed with the attorney representing the state the law enforcement agency discovers or acquires any additional document, item, or information required to be disclosed to the defendant under Article 39.14, an agency employee shall promptly disclose the document, item, or information to the attorney representing the state."), 39.14(k) ("If at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court.").

[131] TEX. CODE CRIM. PROC. art. 29.02 ("A criminal action may be continued by consent of the parties thereto, in open court, at any time on a showing of good cause, but a continuance may be only (continued...)

decision be in the interest of justice, as with reopening to allow additional testimony,[132] or that the discretion be exercised according to a governing statute or framework.[133] These limitations on discretion apply to parties, too, as with the State's ability to dismiss a case "at any time."[134]

There are almost none that appear amenable to appellant's interpretation in this case. Consideration of the consequences in those cases shows why it would also be absurd in this one. Statutes involving arrests and *capias*, for example, say that arrests or *capias* executions can be made "at any time."[135] That cannot possibly mean "under

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[131](...continued)
for as long as is necessary.").

[132] TEX. CODE CRIM. PROC. art. 36.02 ("The court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appears that it is necessary to a due administration of justice.").

[133] *See*, *e.g.*, TEX. CODE CRIM. PROC. art. 59.061(a) ("The state auditor may at any time perform an audit or conduct an investigation, in accordance with this article and Chapter 321, Government Code, related to the seizure, forfeiture, receipt, and specific expenditure of proceeds and property received under this chapter.")

[134] TEX. CODE CRIM. PROC. art. 32.02 ("The attorney representing the State may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge.").

[135] TEX. CODE CRIM. PROC. arts. 15.23 ("An arrest may be made on any day or at any time of the day or night."), 23.07 ("A capias shall not lose its force if not executed and returned at the time fixed in the writ, but may be executed at any time afterward, and return made."), 51.13 §8 ("Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the State and to command the aid of all peace officers and other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this Article to the duly authorized agent of the demanding State.").

any circumstances," as appellant argues it should mean in this case. It would be absurd to believe the Legislature intended that the statutory and constitutional rules for taking custody of a person not apply by virtue of the phrase "at any time." If the Legislature had, this Court would not stand for it.

A better example (from appellant's perspective) are the statutes governing warnings about police interviews. A magistrate must tell a defendant at his initial appearance that he has the right to terminate any interview with peace officers "at any time," and officers must repeat that warning before custodial interrogations.[136] As a matter of fact, a defendant can invoke the right to terminate for any reason (or no reason at all). As a matter of law, that truth does not change the temporal sense in which "at any time" is used. In context, the warning is meant to tell a defendant that he can change his mind at any point in time. This is like the right at issue in this case, except the criminal justice system perceives no obstruction of justice when a defendant chooses to end a custodial interrogation. As appellant agrees, obstruction sometimes results from the withdrawal of waiver of counsel.[137] The Constitution does not countenance that. The Texas Legislature could not possibly have intended it.

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[136] TEX. CODE CRIM. PROC. arts. 15.17(a), 38.22 §2(a)(5).

[137] App. Br. at 20 (calling "the proposition that a trial court may deny withdrawal of a waiver of counsel when doing so would obstruct the administration of justice" "a correct statement about the Sixth Amendment right to counsel").

IV. Conclusion

Appellant had multiple opportunities to be represented by counsel at the proceeding of his choice. He chose to plead guilty and argue a legal issue at punishment *pro se*. His insistence on his right to control his defense following representation by two attorneys, one of whom litigated his desired defense for him, should be respected. So should the trial court's discretion—if not obligation—to prevent another year or more of unnecessary delay.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

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